

THE *578.2.9.*
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Poor Man's LAWYER:

O R,
L A W S

Relating to the
Inferior Courts laid open.

S H E W I N G

How every Man arrested or in Prison in
the Counters, *Marshall's*, *White-Chapel*,
or other inferior Prisons, for Causes of Ac-
tion not arising within their respective Juris-
dictions, may discharge himself altho' Judg-
ment and Execution be had against him.

W I T H

R E A S O N S for punishing Gaolers, and
for regulating their Fees and other Oppressions,
and for suppressing Thefts and Robberies.

By T. P E A R C E, Gent.
Author of the JUSTICE's Pocket-Companion.

In the S A V O Y:

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T H E

Poor Man's Lawyer, &c.

The Nature and Original of Courts; and by what Authority constituted, and to what End and Purpose; wherein is shewn the Difference of Superior and Inferior Courts, and why.

OUR great Lawyer Sir John Fortescue (who was Chief Justice of England in the Time of Henry the Sixth) in that learned Discourse of his, *de Laudibus legum Angliæ*, saith, That all Laws are either the Law of Nature, or Customs, or Statutes, which are called Constitutions; and after that they are put into Writing, and by sufficient Authority of the Prince published, are commanded to be kept, are then changed into the Nature of Constitutions or Statutes, do bind the Subject of the Prince to the keeping of them.

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That

That by the Multiplying of the People, Iniquity so encreased as that Contention and Differences did daily more and more abound, it was impossible that any Person should hear all their Causes, or any Place should be of Capacity sufficient to receive all Suiters: Hence was it therefore, That *Jethro* advised *Moses*, whom God had set over the *Israelites*, (the first People of the World, and to whom any written Laws were delivered) as their chief Ruler, to commit the Distribution of Justice under himself unto several Persons in sundry Places, as in the xviiiith Chapter of the Book of *Exodus*, where it appeareth, *That Moses hearkned to the Voice of Jethro his father in Law, and did all that he had said. And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens; and they judged all the people at all seasons; the hard causes they brought to Moses, but every small matter they judged themselves.* Ver. 24, 25, 26. Now of those who have been most famous for making of Laws in several Nations, *Moses* may very well be ranked in the first Place, by reason that the *Israelites* received theirs from him. *Lycurgus* in the next, from whom the *Lacedemonians* had theirs, and from *Solon* the *Athenians*; the Memory of which Men for their singular Prudence in framing such wholesome and beneficial Constitutions in those Countries is still no less famous

famous than of the greatest Princes, by whose Power they were governed. The *Israelites* had their Courts in the Gates of their Cities, as is manifested from Text of Scripture, where it was said, That the Prophet *Jeremiab* being condemned to die by the Consistory of Priests, was by the Consistory of Princes Secular, or Judges, sitting in the Gate absolved and discharged, *Jeremiab* Chap. 26. and the Reason thereof was (as it is probable) partly that none might go out of the common Way to seek for Justice. The old *Romans*, as we read, had at first their Seats of Justice within their Temples, purposely to shew that Justice was a divine Thing; afterwards in *Curia et Foro*, in the Court and publick Market Place.

And that the *Romans* received some of their Laws from their Kings, some from the *Decem Viri*, some from their Senators, and some from the People themselves.

The *Athenians* had their Seats also in their Temples.

The old *Britains* theirs in some hallowed Place, as is evident from *Cæsar's* Relation concerning the *Druids*. *Cæsar de Bello Gallie.*

That the *Druids* (i. e. the Priests) amongst the *Britains* were the framers of their Laws, is probable enough; for *Cæsar* in the Memorials of his Wars in *Gallia*, speaking of them as the Determiners of all Controversies and Matters of Variance as well Publick as Private, and tho' they do at one time of the

Year sit together, at a certain hallowed Place, on the Borders of the *Carunte* (whose Country is the Middle of all *Gallia*) whereunto all such as have any Differences do resort and submit to such Decree, as is then and there adjudged by them. This Discipline, of theirs, was translated hither out of *Britain*. Vide *Selden*, p. 17 & 123.

Cæsar de Bello Gallie, Lib. 6. saith, That *Britain* had certain and firmly established Laws. *Diodorus* assureth us, *Britannia* (says he) *suis legibus usa est*; and who was it should be the Makers of them but the Kings, by the help and assistance of the *Druids*? for the same *Cæsar* in that Relation plainly tells us, that *Druides fere de omnibus Controversiis publicis privatisque Constituunt, &c.* they determine almost all Controversies and Matters in Variance as well Publick as Private; and if there happen to be any Crime committed, if Murder, if Controversy concerning the Inheritance or Boundaries of Land, they decide it, and award Recompence and Penalties likewise.

It is believed by many that we had not many Persons in this Kingdom, other than of the Clergy, who were learned in the Laws before the *Norman Conquest*, those ages being so illiterate by reason of the several Inroads made upon them by the Barbarous *Northern Nations*, which necessitated the Nobility and Gentry to exercise themselves in Martial Feats, and from this their Ignorance of Letters, probably

bably it was that the Decision of most Controversies and Trials in Civil Cases, were so much by Combat; and in Criminal, by Fire and Water and Ordeal.

In the Time of *William* the Conqueror, one *Alfwyn* Rector of *Sutton*, and divers Monks of *Abingdon*, amongst which *Satolas* and *Goodric*, are specially remembered as Persons so expert in the Laws, that others in divers Parts did easily submit to their Judgment.

And it was likewise said of *Ronulph*, in King *William Rufus's* Reign, whom *William* of *Malmsbury* called *invictus Causidicus*, an unvanquished Lawyer.

It being long after that there were any settled Places for Students of these our Laws, called the Common Law, as hereafter appears: The first Restraint of the Clergy from practising publicly being about the Beginning of *Henry* the Third, where *Richard Poor*, then Bishop of *Salisbury*, amongst other ecclesiastical Constitutions in the 2 *Hen. 3.* under Title of that *de bono Pacis*, hath these Words, *Nec advocati sunt Clerici vel Sacerdotes in foro seculari, nisi vel proprias causas vel miserabilium personarum prosequantur.*

Yet though the Clergy were thus restrained as to their Pleadings in Secular Courts, there was not the like Restriction of ecclesiastical Persons, for sitting as Judges in those Tribunals; for from that very time in one Cathedral, viz. *St. Paul's* in *London*, I find, besides
some

some who were Lord Chancellors, Keepers of the great Seal or Lords Treasurers, these several Persons hereafter named, were Justices in some of the Courts at *Westminster*, or Itinerant, before the Sixth of *Edward* the First's Reign, which was not sixty Years time, viz. *Martin De Palsball* in the second of *Henry* the Third, and several others to the sixth of *Edward* the First.

Nor were there Judges in those Courts of Justice from the Time of the *Norman* Conquest until King *Henry* the Third, other than ecclesiastical Persons, there having been some of the Canons of *St. Paul's* also, viz. *Hugh De Broeland* Justice of *England* in King *Henry* the First's Reign, and several others, as appeareth by an ancient Manuscript written soon after the beginning of *Edward* the First's time, and now in the Custody of the Dean and Chapter of *St. Paul's*. *Dugdale's History* of the Laws of *England*, folio 21.

Statute of *Westm.* 1. which was in the third Year of *Edward* the First, makes mention of Serjeants at Law pleaders.

The *Saxons*, imitating the old *Germans*, did, as *Tacitus* expresseth it, distribute Justice in each Town and Territory, it being their Custom so to do; for which Purpose twelve of the most eminent Men, for their Wisdom and Worthiness, were made Choice of from amongst others to ride several Circuits, for the seeing of Justice done, and good Customs observed :

observed: Hence was it that this Realm became first divided by King *Alfred* into Counties or Shires, and these into Hundreds, and Hundreds into Tithings; so that in every Shire there was a Court, called the County Court, for the determining of all Suits arising within that County; but the Hundred Court was for Suits of an inferior Nature, wherein if the Suiter did not receive Justice there, he then appealed to the County Court as abovesaid, and that these Courts do still subsist; but have since by divers Acts of Parliament been abridged and deprived of their Jurisdictions and Authorities.

King *Edward*, commonly called the Confessor, did select the best and choicest of the Laws of *England*, and reduced them into one Body, called the Common Law, which Laws were published at large by Mr. *Lambard*.

That afterwards, in the twenty-third Year of *Henry* the Second, Justices Itinerant were made; which King divided the Realm into six Parts, into each he sent six Justices, unto whom he gave an Oath that they should faithfully observe those Constitutions which he had then newly made in his great Council of *Clarendon*, commonly called the Assize of *Clarendon*, and cause them to be inviolably kept by all his Subjects. Those Justices, as *Bracton* observes, were called Itinerant, by reason of their Journeying from Place to Place; some times

times for hearing all Causes in general; some times only certain special Matters, viz. Assizes and Gaols. And this Institution of Justices Itinerant, and the Circuit Justices, had its ground from Holy Scripture; for there it is said, *Samuel* ch. vii. ver. 15, 16. *And Samuel judged Israel all the days of his life, and he went from year to year in Circuit to Bethel, and Gilgal, and Mizpeth, and judged Israel in all these places.*

But those Justices continued not their Iters, any longer than King *Edward* the Third; for those which we now call Justices of Assize were instituted in their steads. *Dugdale's Origines Juridicales, folio 51.*

Those Justices, as *Bracton* writes, went their Circuits but once in seven Years; so that the Gaols and Prisons of the Kingdom became burdensome to the Subjects, because there was no Gaol-Deliverance in less than seven Years; by which means the inferior Courts of the Kingdom took upon them the Decision of all Manner of Controversies, even Felony itself.

And it appeareth likewise by *Magna Charta* and other Statutes, that the Common Pleas between Party and Party were holden in the County Court every Month, and so continueth unto this Day, and which was the Law before the Conquest. *Magna Charta, Cap. 11. folio 51.*

The Law made by King *Henry* the First was soon after the great Heat of the Conquest was

was past, which was intended to restore the antient Laws of *England*; for at that time the Bishop with the Sheriff did go in Circuit twice every Year into every Hundred within the County, which also appeareth by the above Chapter of *Magna Charta* in these Words, *Turnum suum per Hundredum*, &c. and it was called *Turnum*, which signified a Court or Perambulation. *Briton, cap. 29.*

We have no printed Cases of the antient Proceedings either in the Sheriff's Torn or in the County Courts; the Reason whereof may be, because Justice was then administred in a summary Way and *de plana*; neither have we any for above 100 Years after the Courts of Law were settled in *Westminster-Hall*, which was about the latter End of King *John*. *Preface to the fourth Modern Reports.*

And here *Comitatus* is taken in the common Sense for the County Court by the Statute of the Second of *Edward the Sixth, cap. 25.*

By which Act every County of *England* concerning the Time of Keeping the County Court is governed by one and the same Law, and is to be accounted twenty-eight Days to the legal Month in this Case, and not according to the Month of the Calendar. *2 Inst. 66.*

And it is observed, that before the Courts of *Westminster* were erected, the County Courts were the chief Courts of the Kingdom; and in former Times had the Cognizance of great Matters, as appears by *Glanvil* and other Writers,

Writers, till they were reduced by *Magna Charta*: But the Hundred Courts still retain the Determination of Trespasses and Debts under 40 s.

In the *Saxon* times, the *Whittingham Mote* was the chief Court of the Kingdom, where all Matters both Civil and Criminal, and also relating to the Revenue, were debated and determined; but for civil and criminal Matters, it was only a Court in the first Instance, for facts arising within the County where it sat; but by appeal from the Justice of other Courts, it heard and determined Causes of all Counties. *Mirror of Justice, cap. 5. s. 1.*

To this Court were summoned the Earls of each County, and the Lords of each Leet, and likewise Representatives of Towns, who were chosen by the Burgeses of the Town, who appeared on the King's Summons, which issued once a Year at least; and here new Laws were erected, or old ones repealed, after the Manner of our Parliament.

But *William* the Conqueror caused the States to recognize him; and fearing that those Parliaments, consisting of *English* Men, might prove dangerous, he established a constant Court in his own Hall, made up of the Officers of his Palace, and they transacted the Business both Criminal and Civil, and likewise the Matter of the Revenue; and as they sat in the Hall, they were a Court Criminal; and when up the Stairs, a Court of Revenue; the civil Pleas they heard in either Court.

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The Court consisted of the *Justiciarius* who presided, and was called *Capitalis Justiciarius totius Angliæ*, and chiefly determined all Pleas, Civil and Criminal, and was also the chief Officer of State. Secondly, The Chancellor who formed all Patents, and put the Seal to them, and had the Custody thereof both for Writs and Patents. Thirdly, The Treasurer, before whom all Accounts were chiefly audited, and he it was that presided in Matters relating to the Revenue. Fourthly, The Constable and Marshal, to whom all Matters of Honour and War and Peace were referred to determine according to the Law of Nations and Arms. Fifthly, The *Seneschal*, or Steward or Marshal, who determined the Quarrels and Disputes between the King's menial Servants; the Marshal was also to keep the Prisoners, and take care of them, that no Indecency was committed in the King's House. Sixthly, The Chamberlain, who was to count the King's Money, as it came in, and issued out of the Treasury.

This was the sovereign Court of the Kingdom, where Justice was administered, and where all Matters of the highest Moment were transacted by the King himself and those Officers; yet in some Cases of great Importance, as upon levying a new War, or raising an Escuage, most of the great Persons that held *in Capite* were called, and then it was termed the *Commune Concilium Regni*, or the

Parliament, to which afterwards the Representatives of Boroughs that held in *Capite* were called. Towards the *Norman* Period the Power of the Justiciary became formidable, and in the Barons Wars turned against the King; the King also found, that the Barons who held large districts, were likely to grow more and more troublesome to the Crown; for tho' the Conqueror's time, and for some Reigns after the Conquest, they were kept in very good Subjection, the *Norman* and *English* Barons being a Ballance for each other; yet time wearing away the Distinction, and the *Normans* growing up *English*, they became fond of those Liberties and Privileges that the *English* had enjoyed in the *Saxon* times: Hence it was necessary to introduce a new Policy; and hence the Original of our Courts, as we have them at this Day in *Westminster-Hall*. See the *Stat. 28 Ed. 1. c. 5.* which ordained, that the Chancellor and Justices of the King should follow him, Court of King's Bench became resident. *4 Ed. 3. Co. 10 Rep. fol. 68.*

To give Countenance to this new Erection and Division of Courts which was compleated by *Edward* the First, as also that it might still be seen that all Justice flowed from the King himself, he sat in Person in the Court of King's Bench; and hence the Power of this Court which still retains the exercising a Superintendency over other Jurisdictions; but though the King was sometimes present, yet the

the Chief Justice gave the Rule, that the King might not decide his own Causes. *Maddox, cap. 19. Speed 521.*

And that the King in his own Person cannot adjudge any Case either Criminal, as Treason, Felony, &c. or betwixt Party and Party, but ought to be determined and adjudged in some Court of Justice; and always Judgments are given, *Ideo Consideratum est per Curiam*; so that the Court gives the Judgment, and the King hath his Court, viz. the upper House of Parliament, in which he with his Lords is the supream Judge over all Judges; for if Error be in the Common Pleas, that may be reversed in the King's Bench; and if the Court of King's Bench err, that may be reversed in the upper House of Parliament, by the King in the Assembly of the Lords, &c. and in this respect the King is called the Chief Justice. 20 *Hen. 7. 7.* So in the King's Bench he may sit, but the Court gives the Judgment; and it is commonly said in our Books, that the King is always present in Court in Judgment of Law, and upon this cannot be nonsuit, and the Judges are sworn to execute Justice according to Law and Custom of *England*; and it appears by the *Stat. 2 Ed. 3. cap. 9.* that neither by the great or little Seal, Justice shall be delayed; and that no King since the Conquest assumed to give any Judgment in any Cause whatsoever, and the King cannot arrest any Man, as the Book

is in 1 *Hen.* 7. 4. for that the Party cannot have remedy against the King. No Man shall be put to answer without Presentment before the Justices matter of Record or due Process, or by Writ Original, according to the antient Law; and if any thing be done against it, it shall be void and held for Error. 12 *Rep.* 64. *Doctor & Student*, cap. 7. fo. 23. *Magna Charta*, cap. 26.

And the King is still supposed to be in Person sitting in Court: And hence every Process in the King's Bench is made returnable before the King himself. *Dier* 18.

But as the King is the Fountain of Justice and the supreme Magistrate of the Kingdom, intrusted with the whole executive Power of the Law, no Court whatsoever can claim any Jurisdiction, unless some way or other derived from the Crown.

Then *Magna Charta*, cap. 29. was established by the Statute of *Westm.* 35. Of this Charter of *Magna Charta* it may be truly said, that it is *Magnum in parvo*; and it is so called because it is *Charta Libertatum Regni*; and upon great Reason it is so called, *quia liberos facit*; some time for the same Cause *Communis Libertas*. This Charter bears date the eleventh Day of *February* in the ninth Year of King *Henry* the Third, and was established by Authority of Parliament; and from that time the antient Laws and Customs were again had in Repute.

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It was for the most part declaratory of the principal Grounds of the fundamental Laws of *England*, and for the Residue it was to supply the Defects of the Common Law, and it was no new Declaration; for King *John* in the seventeenth Year of his Reign had granted the like, which was called *Magna Charta*, as appeareth by Record before this Charter made by King *Henry* the Third; also by the Act of the twenty-fifth of *Edward* the First it was called a Confirmed Charter, and the Charter of the Forest should be taken as the common Law. *Preface to the 2 Inst.*

Therefore King *Edward* the First did encourage the Lawyers in his time to reduce them into order and writing, which was done about the Middle of his Reign by *John Breton*, and the Book called *Breton*, the Statute of *Westm.* 2. is cited, made the thirteenth of *Edward* the First: This was one of the first Systems extant of our Laws: 'Tis true the Book called *The Mirror of Justice* was written before, but many additions were made to it in this King's Reign by *Andrew Horn*, a learned Man in that age: Two Books were written by the Lord Chief Justice *Glanvil* and Justice *Bracton*; the one in the Reign of *Henry* the Second, and the other in *Henry* the Third; but not one more of that Nature almost in the Space of 200 Years: The Book which the Lord Chancellor *Fortescue* wrote in *Henry* the Sixth; cannot properly be called a System of

Law; 'twas published by him to obviate the Design of two great Favourites, the Dukes of *Exeter* and *Suffolk*, who used some Endeavours to introduce the Imperial Law.

But amongst all the Tenures and Customs of our Laws, it is admired that of *Borough English* should still remain amongst us: It is a Custom contrary to the positive Laws of God, and which inverts the order of Nature; it was invented amongst us in a barbarous Age, a very wicked and adulterous Practice after this Manner:

The Lords of certain Lands which were held of them in Villanage, did usually lie with their Tenants Wives the first Night after Marriage: This Usage continued after those very Lands were purchased by Freemen, who in time obtained this Custom on purpose that their eldest Sons, who might be their Lords Bastards, should be incapable to inherit their Estates. *Preface to the third Modern Reports.*

As *Magna Charta* was established by the Statute of *Westm.* 35. it was, amongst other Things therein, said, That *Nullus Capiatur et Imprisonetur nisi per legem terræ*, none ought to be arrested and imprisoned on the Complaint of another for Debt, Covenant or Trespass, in inferior Courts where the Cause of Action arises out of the Jurisdiction.

Great Men and their Bailiffs shall not, on the Complaint of another, attach any one passing through their Jurisdiction for Contracts, &c. which

which do not arise within their Jurisdiction; and for so doing shall pay double Damages; which Statute was made in affirmance of the Common Law. *Comyn's Rep.* 154.

And to the intent that every Court should confine themselves to their proper Jurisdiction, the Statute of *Gloucester* was made; which Statute is divided into four Branches; and says, that no inferior Courts which are not of Record * can hold Plea of Debt, &c. or Damages, but under 40s. so the superior Courts that are of Record, cannot hold Plea of Debt, &c. or Damages regularly, unless the Sum amounts to 40s. or above: For the Wisdom of the Common Law was such, that Men should not be troubled for Suits of small Value in the King's Courts; but that they should be heard and determined in the Country with small charge, or little or no travel, or loss of time; for it was accounted against the Dignity and Institution of those high Courts to hold Plea of small or trifling Causes; otherwise the Law that was instituted for the Quiet of Man and for his Defence might be to his Charge, Vexation and Offence. Courts of Record are intended the Courts at *Westminster propter Excellentiam.* 6 *Rep. fo.* 20.

(6 *Ed.* 1.) And to the intent that every Court should confine themselves to their proper Jurisdiction, the Statute of *Gloucester* was

* Courts of Record intended Courts at *Westminster.*

made;

made; which said Statute was made by Parliament held at *Gloucester* in the sixth Year of *Edward* the First, bordering upon *Wales*, for the better Preservation of the Peace of *Wales*; *Llewellyn* Prince of *Wales*, and the *Welshmen*, being little before this Parliament brought to Quietness.

So that in all regular Governments, Justice being the main Preserver thereof, for if one Court should usurp or encroach upon another, it would introduce Incertainty, subvert Justice, and bring all things in the End to Confusion; therefore the Statute of *Gloucester* was made.

Now as the Superior Courts ought not to encroach upon the Inferior, so the Inferior ought not to defraud the Superior Courts of those Causes that belong to them: For Example; If in the County Court or other Inferior Court they shall divide a Debt of 20 *l.* into several Plaints under 40 *s.* in this Case the Defendants may plead the same to the Jurisdiction of the Court, and may have a Prohibition to stay that indirect Suit; for as an antient Record saith, the Maxim of the common Law is, *Quod placita de catallis, debitis, &c. quæ 40 s. attingunt, vel eum excedunt, secundum legem et Consuetudinem Angliæ sine brevi Regis placitari non debent.*

And these Words *sine brevi Regis*, are material Words; for by the King's Writ the Sheriff in the County Court may hold Plea for above 40 *s.* *al' meins* have received this
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Construction, that the same must appear to be of the Value in the Plaintiff's Count; for it is not sufficient, that it appears by Verdict that the Sum is under 40*s.* for Example; if the Plaintiff counts in Trespass, Debt, &c. to the Damage of 40*s.* and the Jury find Damages under 40*s.* yet the Plaintiff shall have no Judgment, albeit in truth the Cause *de Jure* belonged to the inferior Court.

Of the Antiquity and Jurisdiction of the County Court abovementioned, you may read in the Statute of *Magna Charta*, cap. 35. it holdeth no Plea of any Debt or Damages to the Value of 40*s.* or above; nor of any Trespass done *vi et armis*, because a Fine is due thereby to the King; but of Debt, Detinue, Trespass and other Actions Personal above 40*s.* the Sheriff may hold Plea by force of a Writ of *Justicies* to him directed, for that is in the Nature of a Commission to him, and is *Vicountiel*, and not returnable; and he may before any County Court award a Summons to his Bailiff, returnable within two or three Days at his Discretion, to summon the Defendant by his Goods, &c. to answer; and if the Bailiff return *Nihil*, and the Plaintiff removeth the same by a *Pone* in the Common Pleas, that Court shall not grant a *Capias*; for the Nature of the Writ doth not Warrant a *Capias*, and the Sheriff could not grant the same; neither doth the Writ of
Justicies

Justices alter the Nature of the Court of the County, for therein the Sheriff is not Judge, but the Suitors; and upon a Judgment given therein a Writ of false Judgment doth lie, and not a Writ of Error; and in divers real Actions, a Writ of *Justices* doth lie, as it appeareth in our Books. 3 *Inst.* 266.

The County Courts to be held Monthly, and the Sheriff's Torn twice a Year, after *Easter* and *Michaelmas*. 9 *Hen.* 3. The Statute of the 31 *Ed.* 3. c. 15. directs the Torn to be held within a Month after *Easter* and *Michaelmas*; and County Courts to be adjourned from Month to Month and no longer. 3 *Ed.* 6.

By the Policy of the Common Law, that Suits might not encrease and multiply, both Plaintiff and Defendant, Demandant and Tenant, in all Actions real and personal and mixt, did appear in Person as well in Courts of Record as not of Record, because the Writs do command the Tenant and Defendant to appear, which was always taken in proper Person; and the Entry in every Action for the Demandant or Plaintiff is, *Et prædictus petens or querens obtulit se 4to die, &c.* which was ever understood in proper Person; for by the Common Law no one could appear by Attorney without the King's Writ or Letters Patents, but was forced to follow his Suit in Person, by reason whereof there were but few Causes in our Courts: But since
several

Several Statutes have provided, that it shall be lawful to appoint Attornies without any such Authority to enable them. 2 Inst. 249.

When this and other Statutes had given way to appear by Attorney, it is not credible how Suits in Law multiplied, for the most part (for unnecessary and trifling Causes) when the Parties themselves might sit quiet at home; Dangerous and ill Success have ever attended the Breach of the Maxims and antient Rules of the Common Law.

It appeareth by *Glanvil*, that the Justices admitted the Parties *per Responsalem loco suo ad locandum vel respondendum*, but only when the Parties themselves were present; for he saith, *verum oportet cum esse presentem in Curia qui Responsalem ita in loco suo ponit; et Nota differentiam inter responsalem et Attornatum.*

The Mischief before the Statute of *Westm.* was made, great Men and others that had particular Jurisdictions, had power to hold Plea of Contracts, Covenants and Trespases, made or done within a certain Precinct, or within a Manor, City, or Borough, would attach others by their Goods to answer their Courts of Contracts, Covenants, &c. made or done out of their Power or Franchises, pretending the same to be transitory; and suppose the same to be done within their Power and Franchise, which was to the Prejudice of the King and his Crown, in losing his Fines, in Actions of Debt and Trespas

vi et armis, and Amerciaments and other Profits, upon false Supposals, not like the general Jurisdiction and Power of the King's Justices of the Courts through the Realm; for wheresoever the Contract, Covenant, Trespass, &c. were made, the Matter being transitory, the Plaintiff may alledge it in what County he will, and the King can lose nothing; and so it is in the King's Bench and Exchequer against privileged Persons, in those general Courts; and the Statute saith further, and to the Damage of the Party being attached and sued as he is passing and travelling within the particular Precinct upon a false Supposal, where in truth he ought not; for this Mischief this Act provides Remedy, as by the same shall appear. *Magna Charta, cap. 28.*

And the Statute of *Westm.* says, that no one except the King's Ministers to arrest any Person passing through a Liberty, not holding thereof, for any Trespass, &c. done out of the Liberty. *3 Ed. 1. cap. 50.*

And it was to be observed, that at the making of this Statute, if a Man had brought an Action of Debt, Account, Detinue or Covenant, upon any Contract by Original Writ, in the County of *Norfolk*, he might have declared of this Contract in *Suffolk*, or in any other County, than where the Original was brought; for the Rule was, that *debitum et contractus, &c. sunt nullius loci*, and every Duty is a Duty in every County; but in Case of

of Account, this Diversity is to be observed, that on Account against a Receiver, the Law was then as aforesaid; but if a Man brought an Action of an Account against one as Bailiff in one County, he could not charge him as Bailiff of a Manor in another County, for that is local. *Co. Rep. fo. 7. Palmer's Case.*

But after this Act, it was provided by the Statute of *Rich. 2. cap. 2.* that in Pleas of Debt or Account or such like, as Detinue or Contract, it shall not be declared, that the Contract was made in any other County than is contained in the original Writ.

But at the Common Law, one that had a particular Jurisdiction to hold Plea of Debt, Contract, Detinue, Covenant or Trespafs, within his Manor, or the like, could not hold Plea of Debt, Contract, Account, Detinue, Covenant or Trespafs, alledged to be made out of the Manor, &c. because albeit it was transitory; yet was it (being alledged) within his Power or Jurisdiction, which he had by Prescription by Grant; for all Pleas holden there must be *infra Jurisdictionem Curiae.*

For Relief of the Subject upon this Statute, two original Writs are framed; the one in Nature of a Prohibition before the Suit begun, commanding, that the Party shall not be arrested contrary to the form of the Statute of *Magna Charta, cap. 28.*

The other after the Suit began; the Party is to recover the Penalty of this Act; viz.

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double Damages, and a Command to deliver the Goods attached or distrained; both which Writs appear in the Register. But the Party may waive the Benefit of this Statute; and therefore if he plead to the Action any Bar, &c. he hath concluded himself, and shall not have any Action upon this Statute; therefore he must plead the special Matter, and by that means take the Benefit of this Act.

The Statute before-mentioned intends not to bar the Party the Benefit of a Prohibition, although he should plead a Plea in Bar or any other Plea in the said Court; but only that by so doing it he waved the Benefit of the Statute of double Damages, and shall not by his Plea admit the Jurisdiction of such inferior Court to estop him from a Prohibition or an Action of the Case for Damages.

Now as the Subjects of *Great Britain* are by the Statute of *Magna Charta* not to be taken and imprisoned on the Plaint of another for Debt, Covenant or Trespass, in inferior Courts where the Cause of Action did arise out of the Jurisdiction; therefore he that sues in an inferior Court is bound at his Peril to take notice of the Bounds and Limits of that Jurisdiction; and if the Party after a Verdict below prays a Prohibition, and alleges that the Court had no Jurisdiction, a Prohibition shall be granted; and 'tis no Estoppel that he did not take advantage of it before. 2 *Mod. Rep.* 197.

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In justifying under the Process of an inferior Court it is necessary to shew, that the Process levied was within the Jurisdiction of the Court. Lord Chief Baron Comyn's, *Rep.* 574.

Therefore it appears, that every Subject of *Great Britain* by *Magna Charta*, and the Statute of *Westminster*, is intitled to a Prohibition when he is brought into a private Jurisdiction when the Matter arises out of it; for in that Case the Liberty of the Subject is infringed, and the Prohibition is not *ex gratia* but *ex merito Justitiæ*, grounded on the Constitution of the Kingdom, and confirmed by *Magna Charta* as abovesaid; and therefore our Sovereign Lord the King at his Coronation, amongst other things, taketh a solemn Oath, that he will Cause all the Customs of this Realm faithfully to be observed; for as the Law is the Rule of the King's Prerogative, which does not extend to any thing injurious to others; and as the Subject owes to the King his true and faithful Obedience, so the King is to defend the Laws and protect the Bodies and Goods of his Subjects. 12 *Rep.*

And the Lord High Chancellor, who is the chief Administrator of Justice next to the Sovereign, is invested with the King's absolute Power, governing his Judgment purely by the Laws of Nature and Conscience, is upon proper Application made to him by the proper Officers, obliged to grant a Prohibition, which Prohibition is an original

Writ, and issues out of the Court of Chancery; which Court is always open in Vacation, as well as in Term-time; whereas other Courts are confined to the Term.

And the Lord *Coke* says, that Prohibitions are to keep every Jurisdiction in its true Limits; and it cannot be said to be an Abuse, nor can it be altered but by Parliament.

Prohibitions by Law are to be granted at any Time to restrain a Court from intermeddling with or executing any thing which by Law they ought not to hold Plea off, and they are much Mistaken that maintain the Contrary. 2 *Inst.* 602.

And the Lord *Coke* further said, that all Prohibitions, being Original Writs, ought only to issue out of Chancery, and neither out of the King's Bench or Common Pleas; and that this hath been the antient Practice in that behalf, as appears by some Statutes and sundry Judgments at Common Law. 2 *Inst.* 602.

And for that the Common Law is founded upon the Perfection of Reason, and not according to any private and sudden Conceit or Opinion.

This Prohibition abovesaid is grounded on an Affidavit; which Affidavit must be delivered to the Cursitor of the County wherein the inferior Jurisdiction doth lie. If in *London*, then you must apply to Mr. *Buxton* in *Fetter-Lane*, who is Cursitor for *London* and *Middlesex*; but if in any other County, then

to the Cursitor's Office in *Chancery-Lane*; in which Office you will readily find the proper Clerk that acts for the County you shall want.

The Affidavit to ground this Prohibition must be writ on a double six-penny Stamp, and sworn before a Master in Chancery; but if the Defendant be in Prison in one of the Counters, you must get one of the Masters in Chancery to go thither, and take the Defendant's Affidavit; but if the Defendant be Poor, then your application must be to a Master at his Chambers; and upon representing such Poverty, he will attend and take his Affidavit, paying only his Coach-hire: But if the Defendant be in the *Marshalsea*, or in any other Country Jurisdiction, then a Master in Chancery extraordinary, or Mayor, Recorder of a Corporation, will take such Affidavit.

The Affidavit to ground such Prohibition is as follows:

John Styles Plaintiff, and *John Nokes*
Defendant.

THE Defendant in this Cause maketh Oath, that the Cause of Action, if any, did not accrue to the Plaintiff within the Jurisdiction of the Sheriff's Court of the City of *London*; or if it be in any other inferior Court, then you must name such Court.

Sworn at the Publick Office in Chancery-

Lane, if the Defendant be at Liberty,

otherwise say, Sworn before me this

Day of

1755.

J. B.

The Prohibition.

GEORGE the Second, by the Grace of God, of *Great Britain, France and Ireland*, King, Defender of the Faith, &c. To the Sheriffs of *London*, greeting: Whereas by the Common Council of *England* it is provided, That it is not lawful for any one in *England* but for Us and our Ministers, having special Authority so to do, to attach any Persons going through his Bailiwick or Power, to answer another upon any Contracts, Covenants or Trespasses, done without the same Bailiwick or Power: We Command you, that you do not attach *W. A.* to answer *F. W.* before you in your Bailiwick, upon such Contracts, Covenants or Trespasses, against the Form of the aforesaid Proviso: And if you have made any Arrest or Distress upon the said *W. A.* upon that Occasion, you forthwith discharge it. Witness ourself at *Westminster* the first Day of _____ in the twenty-seventh Year of our Reign.

Buxton.

For which Prohibition you pay Mr. *Buxton* the Curfitor 8 s. 8 d. and the other Curfitors the same: And when such Prohibition is sealed and delivered you, you then forthwith go with the same to the Judge's Clerk of either Counter, who takes 6 s. 8 d. for the Allowance, and who will immediately go with you

to the Counter, and allow it in the Counter-Books, where all Actions in their respective Offices are entered: And when such Prohibition is allowed, the proper Officer of that Counter will give you a Note to the Gaoler to discharge such Defendant; but if such Defendant be not in Custody but in Bail, then such Cause and Bail is forthwith to be dismiss out of Court; but if the Defendant should be imprisoned in the *Marshalsea*, *White-Chapel* or in any other inferior Prison, then you must observe to get the Title of such inferior Court, which may be found in the *Compleat Attorney and Solicitor*, which carry to the Curfitor as abovesaid. The Fee to the *Marshalsea* and *White-Chapel* for such Allowance is 4s. 4d.

So cautious are the Superior Courts in observing and watching over the Inferior, by keeping them in due Bounds, lest the Liberties of the Subject might be infringed, that the Court of King's Bench have laid it down as a Rule, and it was agreed to by the Court, that whatever is essential and necessary to maintain an Action, if the Action be brought in an Inferior Court, the Matter must be averred to have been within the Jurisdiction, otherwise they have no Jurisdiction; for whatever is not averred to be within their Jurisdiction, shall be intended out of it. *Saunders* 73.

It hath been adjudged in the King's Bench, that an Inferior Court cannot hold Plea of a
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Quantum meruit for Work done out of the Jurisdiction, though the Promise be made within. 2 *Mod. Rep.* 141.

And in Case a Person shall buy Goods of a Shopkeeper, or any other Tradesman in the City of London, and should deliver the same to the Person out of the City, or any other Liberty, such Shopkeeper cannot bring his Action in the City, for that the Debt did accrue to the Plaintiff where the Delivery was, which was out of the Jurisdiction: So the like Case of a Note of Hand, or a Bond, the Action cannot be brought in an Inferior Court, unless the same was given therein; otherwise a Prohibition will lie to that Inferior Court, upon an Affidavit as aforesaid; and an Action upon the Case will lie against the Plaintiff for Commencing of an Action against the Defendant in an Inferior Court, when the Cause of Action did arise out of the Jurisdiction.

*It is said that the Court of King's Bench have said it is not a Rule, and it was agreed to by the Court, that whatever is essential and necessary to maintain an Action, if the Action be brought in an Inferior Court, the Plaintiff may be allowed to have been within the Jurisdiction, otherwise they have no Jurisdiction; for whatever is not agreed to be within their Jurisdiction, shall be regarded out of it. 2 *Samuel* 73. It hath been adjudged in the King's Bench, that an Inferior Court cannot hold Plea of*

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A Declaration in an Action on the Case for holding a Man to Bail for Debt for Rent within the Liberty of the City of London, when the Debt was commenced in the Country out of the Jurisdiction of the Court of the Sheriffs of London. See the Declaration and Judgment thereon.

Baugh against Killingworth.

THE Plaintiff was indebted for Rent of a House and Lands in the Country, and coming to *London* was arrested by the Defendant by Virtue of a Plaint levied in the Sheriff's Court of *London*, for which he brought an Action on the Case, and declared, &c. Whereas the Defendant contriving and fraudulently intending the said *B.* in this Behalf, craftily and subtilly to deceive and defraud, the said *B.* the fifth Day of *April* in the tenth Year of the Reign of our Sovereign Lord the now King at *London*, to wit, in the Parish of *St. Mary* in the Ward of *Cheap*, maliciously him the said *B.* by Pretence and Colour of a certain pretended Plaint in the Court of the Lord the King, there held before *J. F. Knt.* then one of the Sheriffs of *London*, in his Counter, situate in the Parish and Ward aforesaid, entred and levied at the Suit of *K.* upon a certain pretended Action to the great pretended Damage of him the said *K.* caused and procured to be arrested and imprisoned; also

the said *B.* in Prison and Custody there, by Reason of the arresting aforesaid, by a great Time, to wit, by the Space of six Days, was detained for want of sufficient Bail and Security to the pretended Action aforesaid, by the pretended Damage aforesaid; where, in truth and in fact, the said *K.* at the Time of Arresting and Imprisoning the said *B.* as reported, or at any Time before, had not any Cause of Action against the said *B.* within the Jurisdiction of the same Court; by Reason whereof unjustly and maliciously in Arresting and Imprisoning him the said *B.* the said *B.* not only in Prison and Custody by the whole Time aforesaid was detained, and of his Liberty was deprived upon the pretended Action aforesaid, for Damages aforesaid; but also great Labour and Expences for his Relaxation from the Arresting and Imprisonment aforesaid did lay out, and was compelled to lay out and expend; from whence he saith, he is made worse, and hath Damage to the Value of 500*l.* and thereupon he brings his Suit.

4 *Mod. Rep.* 13.

In the Case of *Holdson* against *Cook*, after a Verdict for the Plaintiff, upon Not guilty pleaded, it was moved in Arrest of Judgment, that it was not set forth in the Plaintiff's Declaration, that the Defendant did know that the Place where the Action arose was out of the Jurisdiction, which it would be hard to put the Plaintiff to take Notice of.

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On the other Side it was said, that the Party ought to have Recompence for the Inconvenience he is put to, he being put to Bail perhaps in a Case where Bail is not required above, and such like Disadvantages which are not in Suit here; and the Plaintiff ought at his Peril to take Notice; the Court said, the Officer is not punishable that executes such Process; but an Action will lie against the Party: And so it was resolved in a Case between *Cowper* and *Cowper*, *Pas. 18 Car. 2. in Scacc.* when my Lord Chief Justice *Hale* sat there.

On a Motion for a *Superfedeas* to a Prohibition out of the Court of Chancery to an Inferior Court, for that the Prohibition was prayed at the Suit of the Party after he had pleaded to Issue, and by that had submitted to the Jurisdiction of the Inferior Court,

Lord Keeper said, that this was a good Cause why a Prohibition should not go at the Suit of the Party. But where an Inferior Court meddles with Matters out of its Jurisdiction, I will grant a Prohibition for the King in such Case: But if you bring an Affidavit that the Cause of Action did arise within the Jurisdiction, upon that I will award a *Superfedeas*. 1 *Vern.* 301.

Prohibitions are granted to Inferior Courts upon Affidavit that they hold Plea of Matter out of their Jurisdiction. *Ibid.* 276.

A Prohibition was granted by the Court of Chancery in *Easter* or *Trinity* Term 1737. by the

the present Lord *Hardwicke*, Lord High Chancellor, in a Cause wherein *Stradford* was Plaintiff and *Beauchamp* Defendant, on the usual Affidavit; and the Person attached was in *Woodstreet* Counter; and the Prohibition was tendred and allowed by the Judge's Clerk, that upon the Judge's Clerk coming into the Office and finding the Action entred in the said Office in the Name of *Beacham*, and the Prohibition in the Name of *Beauchamp*, the real Name of the Defendant, upon which the Judge's Clerk, and the Clerk of the Papers differing, the Prisoner there was not discharged pursuant to the said Prohibition, on Affidavit which was made; and upon Motion in Court, setting forth the same, his Lordship was pleased to order, that the Judge of the Sheriff's Court, his Clerk, and the Clerk of the Papers of the Counter, should shew Cause why an Attachment should not be granted against them for not discharging the Defendant *Beauchamp* out of Prison, pursuant to the abovesaid Prohibition; but this Matter was compromised, and the Defendant discharged out of Prison. *Trinity Term 1737.*

At Common Law, one that had a particular Jurisdiction to hold Plea of Debt, Contract, Detinue, Covenant or Trespass, within his Manor, or the like, could not hold Plea of a Debt, Contract, Account, Detinue, Covenant or Trespass, alledged to be made out of the Manor, &c. because albeit

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it was transitory; yet was it (being alledged) within his Power or Jurisdiction, which he had by Prescription or by Grant; for all Pleas holden there must be *infra Jurisdictionem Curie*.

As if a Lord of a Manor hath Probate of Testaments made within the Precinct of his Manor, he cannot prove a Testament made out of the Precinct of his Manor. 2 Rich. 2. Title Testament 4. 11 Hen. 7. 12.

And likewise the Court of Piepowders of Contracts, &c. made out of the Fair or Market; *et sic de cæteris*. Lib. 6. fo. 20. Michelborn's Case. Stat. Westm. 1.

This Court of Piepowders is incident to every Fair and Market as a Court of Record to be holden before the Steward of the Court; and the Jurisdiction thereof consisteth in four Conclusions: The Contract or Cause of Action must be in the same Time of the same Fair or Market, and not before, or in a former. Secondly, It must be for some Matter concerning the same Fair or Market done, complained on, heard and determined. Thirdly, It must be within the Precinct of that Fair or Market. Fourthly, The Plaintiff must take an Oath according to the Statute of 17 Ed. 4. cap. 2. That the Matter of the Complaint and Declaration was done within the Jurisdiction and Time of the Fair. Stewards proceeding or holding Plea otherwise shall forfeit 5 l. But that concludeth not the

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Defendant: And this was resolved and adjudged in a Writ of Error brought by *Hull* against *Jones*.

This Court of Piepowders being incident to the Market, hath no Jurisdiction of such Things as concern the Market in slanderous Words; but if any one slanders the Wares of any in the Market, whereby he cannot make Sale of them, an Action doth lie in that Court.

That no Plea shall be holden in the Court of Piepowders, except the Plaintiff or his Attorney will make Oath, that the Contract or other Deed contained in the Declaration, was done or committed within the Time of the Fair. *3 Inst. 272.*

A Prohibition was prayed to the Court of *Eye*, and the Case was, One contracted with another for divers Parcels of Malt; the Money to be paid for each Parcel being under 40s. and he levied divers Plaints thereupon to the said Court, wherefore the King's Bench granted a Prohibition; because tho' they be several Contracts, yet forasmuch as the Plaintiff might have joined them all in one Action, as he ought to have done, and sued here, and not to have put the Defendant to an unnecessary Vexation, no more than split one intire Debt into divers, to give the Inferior Court Jurisdiction *in fraudem legis.* *1 Vent. 73.*

The King's Courts may award Prohibitions, being informed by the Plaintiff or Defendant.

or by any Stranger, that any Court, Temporal or Ecclesiastical, do hold Plea, whereof they have no Jurisdiction, may lawfully prohibit such Court, as well after Judgment and Execution, as before; and if the Judge of the Inferior Court, or the Party, proceeds notwithstanding a Prohibition, an Attachment may be had against them, or an Action of the Case will lie against them. *Wood's Inst.* 570. *Viner's Abridgment* 549.

All the Judges agreed, that the granting Prohibitions is not a discretionary Act of the Court, but are grantable *ex merito Justitiæ*. *Raymond* 3, 4.

If a Man be wrongfully brought into a Jurisdiction, and there lawfully arrested, yet he ought to be discharged; for an unlawful Thing, founded upon a wrongful Act, cannot be supported. *Report of Cases in Queen Anne's Reign*, fo. 510.

The Inferior Courts of Record, as ordinarily so called, are Corporation Courts, Courts Lect and Sheriff's Torn, &c.

Courts, not of Record, are Courts Baron, County Courts, Hundred Courts, &c.

Courts, not of Record, cannot impose any Fine on an Offender, nor award a *Capias* against him, nor hold Plea of Debt or Trespass, if the Debt or Damages amount to 40 s. nor of Trespass *vi et armis*, though the Damages are laid under 40 s.

But the Superior Courts may hold Plea of Trespass, &c. though under 40 s. relating to Freehold, as Detinue of Charters, &c. or Trespass *vi et armis*.

If an Action be brought on a Promise in a Court below, not only the Promise but the Consideration must be alledged to arise within the Jurisdiction of such Inferior Court; for a Debtor, who has contracted a Debt, does not by coming into the Limits of such Jurisdiction give such Court authority to hold Plea thereof; nor is it sufficient to alledge the Cause of Action within the Jurisdiction of the Court, but it must be proved upon the Trial; and if the Plaintiff proves a Consideration out of the Jurisdiction, it cannot be given in Evidence; if it be, the Defendant's Counsel may propose a Bill of Exceptions; and upon such Bill of Exceptions the Judgment will appear to be erroneous.

In Error to reverse a Judgment in the Palace Court in an *Indebitatus assumpsit*, for that the Defendant was indebted to the Plaintiff *infra Jurisdictionem*, for Nursing of a Child; and for not saying, the Nursing was *infra Jurisdictionem ibidem nutrit*, the Judgment was reversed. 1 Saund. Rep. 73. And in the Case of *Penneck* against *Bell and Kendall* the Plaintiff declared, that the Defendant *infra Jurisdictionem indebitatus fuisse* to the Plaintiff in 39 l. *pro diversis Merchandisiis per quer' eidem Defendenti ante tempus illud vendit' et deliberat'*;

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held nought in an Inferior Court, for not saying *ibidem vendit*, &c. but good in a Superior Court, and in the County Palatine of Durham, for that is an Original and Superior Court. *Trials per pais* 155.

In a Declaration in an Inferior Court every Count therein must set forth the Jurisdiction *tunc et ibidem*, otherwise it is Error; for that laying the Jurisdiction in the *Indebitatus*, will not do, without the other Counts set forth the Jurisdiction. In a Case of the City of Bristol, Lord Chief Justice Holt's Reports, and in the Case of *Cudmore and Tripe*, on a Judgment given in the Provost Court of Exeter, this was in an *Indebitatus assumpsit* and *Quantum meruit*, and doth not say in the *Quantum meruit*, that the Cause of Action was *infra Jurisdictionem*. Carthew, Serjeant, said, If it had been omitted in the first Promise, I confess it had been ill; but said, he conceived the *infra Jurisdictionem* in the said *Indebitatus assumpsit* goes to all. But Chief Justice Holt said, indeed there wants the *tunc et ibidem*; let Judgment be reversed. *5 Mod. Rep.* 78.

An Inferior Court cannot hold Plea of an Obligation, Contract, Battery, or other transitory Action, if it was not made within the Jurisdiction. *2 Inst.* 231. Whereupon a Prohibition will be granted. *Salk.* 201.

Tho' the Defendant by Plea admits the Jurisdiction, yet the Superior Court may grant a Prohibition.

In the *Marshall's Court* the Plaintiff declares, that in Consideration the Plaintiff, at the Request of the Defendant, had taken Pains to procure him a Lease of a House in *Holborn*, the Defendant *apud S. infra Jurisdictionem, &c.* promised to pay him *10 l. &c.* this is not sufficient to intitle the Court to a Jurisdiction, inasmuch as it does not appear, that *Holborn*, where the House now stands, is within the Jurisdiction; and the Jury are not only to try the Promise, but the Consideration also. *1 Lee 50. Ramsey and Adkinson* adjudged, and Judgment in the *Marshall's Court* reversed.

So in an *Indebitatus assumpsit* for Money for a Cow sold, it must appear, that the Sale was within the Jurisdiction; for the being indebted there, does not necessarily imply, that the Sale was there; for he that is indebted in one Place, is so in every Place. *1 Sid. 87. 1 Vent. 243.*

In Debt for Rent, upon a Lease made *infra Jurisdictionem* of an Inferior Court, it ought to appear also, that the Lands lie within the Jurisdiction; for if Part of the Cause arises within the Jurisdiction, and Part without, the Inferior Court ought not to hold Plea thereof. *Viner's Abridgment.*

And it was laid down as a Rule, in *1 Cro. 57. and 1 Rol. Abr. 546.* that, if that which is the Gift of the Action, and the compleat Cause of it, be laid within the Jurisdiction,

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and the Declaration shews further Matter, which is only Aggravation or consequential Damage, without which the Action would have lain, such Matter need not be averred to be within the Jurisdiction. As in Case for calling a Woman Whore, whereby she lost her Marriage, there, not only the Words, but also the Loss of Marriage, must be alledged to be within the Jurisdiction; because the one, without the other, would not maintain the Action; and there, one may confess the Words, and traverse the Damages: So in Trespass by a Master for the Battery of his Servant, whereby he lost his Service; the Loss of the Service, as well as the Battery, must be laid within the Jurisdiction: But in an Action by a Tradesman for calling him a Cheat in his Trade, whereby he lost his Customers, need not be alledged within the Jurisdiction; because Words are actionable without it, and it is only Aggravation. 1 Cro. &c. mo. d. 1.

In false Imprisonment, the Defendant justified by a *Capias* out of an Inferior Court, directed to him against the Plaintiff, to which the Plaintiff demurred; because it was not shewn, that a Summons was issued first; and Inferior Courts can award no *Capias*, but on a Summons first to be returned. 1 Kent. 220, 249, 369.

My Lord Chief Justice *Hale* said, it was a great Abuse in these Courts, their ordinary Practice being to grant a *Capias* without a Sum-

Summons; so that the Party is driven to Bail in every trivial Action; and though upon a Writ of Error this Matter is not assignable, because a Fault in the Process is aided by Appearance; yet false Imprisonment lies upon it, and the Officer cannot justify here, as upon a Process out of the Courts of *Westminster*. *Ibid.*

In Error of a Judgment in *Norwich*, the Error there assigned was, because in an Action of Debt, the Record was *attacbiatus*, where it ought to have been *summonitus est*; for it ought to be as an Original; and for want thereof it is Error. *2 Cro. 108.* The Statute of *Jeofails* extends only to Courts of Record at *Westminster*. Inferior Courts are left as they were originally at Common Law.

Every Inferior Court ought first to issue a Summons, otherwise 'tis Error. The Case of *Cinque Ports* in Error *2 Cro. 261.* *Styles's Rep. fo. 197.*

At Common Law (except in special Cases) neither the Land nor Body were liable to Execution in Debt or Damages recovered; but Execution was to be done by *Fieri Facias* or *Levari Facias* of his Goods and Chattels, and Profits growing upon his Lands: But in Debt brought against one as Heir, his Lands were liable to Execution; because the Plaintiff had no other Remedy; for Goods belong to the Executors. But the Body, Goods and Lands of the King's Debtor or Accountant, were never liable to Execution. By the Statute of *Westm.*

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Westm. 2. cap. 18. an *Elegit* is given of the Moiety of the Land, which was the first Act that subjected Lands to Execution for Debt or Recognizance. And by the Statute of the 13 *Ed. 1. cap. 9. de Mercatoribus.* 27 *Ed. 3. cap. 9.* 23 *Hen. 8. cap. 6.* and the Statute Merchant and the Staple, all the Lands of the Conusor, at the Day of Acknowledgment, shall be extended, into whose Hands soever they shall after come. But in all Acts *vi et armis*, where a *Capias* lieth in Process, there, after Judgment, a *Capias ad satisfaciendum* lieth; and the King shall have a *Capias pro fine*: And in such Cases, the Law (the Preserver of Peace) subjecteth the Body to Imprisonment. And by the Statute of *Malbridge, cap. 23.* *Westm. 2. cap. 11.* a *Capias* was given in an Account, the Process before being a Distress infinite. And by the 25 *Ed. 3. cap. 17.* the same Process was given in Debt as aforesaid. *Co. 3 Rep. fo. 11.*

As to Inferior Courts, I must submit it whether they can award Process of *Capias* either before or after Judgment, for the Reasons aforesaid. The Statute of 28 *Ed. 1. cap. 3.* says, That the Stewards and Marshals of the King's House are not to hold Plea of Freehold, Debt, Covenant or Contract; but only of Trespass within the Verge, or of Contracts and Covenants, when both Parties are of the House.

'Tis said, that the Stewards and Marshals of the King's House have obtained a new Grant from the Crown; wherein it is said, that, by that Grant, they can hold Plea of Contracts, &c. altho' neither Plaintiff or Defendant are of the King's House; and by Virtue of such new Grant, award a *Capias* to attach the Body, both before and after Judgment; although at Common Law, he that recovered Debt or Damages in the King's Courts, by an Action wherein a *Capias* lay in the first Process, then might he have a *Capias ad satisfaciendum* to take the Body of the Defendant, and to commit him to Prison till he should pay the Debt and Damages recovered. But if there lay no *Capias* in the first Action, then the Plaintiff shall have no *Capias ad satisfaciendum*. And this *Capias* abovementioned was given by the Statute of 25 Ed. 3. c. 17. for before this last mentioned Statute the Body was not liable to Execution in Debt or Damages recovered; but Execution was to be done by *Pieri Facias* or *Levari Facias* of his Goods and Chattels; but as to Inferior Courts they were left, as they were originally at Common Law, to proceed by Summons and *Distingas* against the Goods. 'Tis true indeed, the City of London, and all other Cities and Towns, &c. had their antient Liberties and Franchises confirmed by *Magna Charta*, and the 9 Hen. 3. But as to any other Inferior Courts, they not being confirmed or appointed

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ed by any Statute, they must proceed as they did at Common Law before the Statute of 25 *Ed. 3.* And neither the Statute of *Malbridge*, or the Statute of *Ed. 3.* abovementioned, give any Authority to Inferior Courts to attach the Body of the Defendant, but to Courts of Record; which said Courts of Record are intended the four Courts at *Westminster*. And here it is to be observed; that where a Statute prohibits a Thing, and appoints that the Offence shall be heard and determined in any of the King's Courts of Record, it cannot be proceeded against, but only in one of the Courts of Record, which shall be intended the King's Courts at *Westminster*, *secundum Excellentiam*. *Co. 6 Rep. 10.* 1 *Salk. 178.*

And it is said, the King cannot grant any new Commissions whatsoever, that are not warrantable by antient Precedents, however necessary it may seem conducive to the publick Good. 4 *Inst. 163.* 2 *Inst. 478.* 18 *Ed. 3.*

The Case of *Clark* in the Court of Common Pleas, An Action was brought against the Mayor of *St. Albans*; and the Case was thus:

King *Edward* the Sixth incorporated the Town of *St. Albans*, and granted them to make Laws and Ordinances, &c. The Term was kept there; and the Mayor, &c. by the Assent of the Plaintiff, assessed every Inhabitant for the Charges in Erecting of the Courts there; and if any did refuse to pay, &c. to be imprisoned, &c. The Plaintiff being a Burgeſs

Burgeſs of the ſaid Town reſuſed to pay, and the Mayor juſtified, &c. and it was adjudged no Plea, &c. for this Ordinance is againſt *Magna Charta*, cap. 29. becauſe no Man ſhall be taken and imprifoned, diſſeiſed or otherwiſe deſtroyed, but to be put to anſwer by the Law of the Land; and this Cuſtom is confirmed by *Magna Charta*: And by this Cuſtom of the Realm, all Men great and ſmall ſhall do and receive Juſtice in the King's Courts; and this Cuſtom is confirmed by the Statute of *Malbridge*; and the Aſſent of the Plaintiff cannot alter the Law in this Caſe. But it was reſolved, that the Mayor, &c. might inflict a reaſonable Penalty, but not Imprifonment; which Penalty ought to be levied by Diſtreſs, or Action of Debt will lie for ſuch Penalty; and the Plaintiff for the Reaſons aforeſaid had Judgment. Co. 5 Rep. 64.

I muſt therefore ſubmit, whether any Inferior Court can attach the Body by *Capias*, &c. being it is contrary to *Magna Charta*, for the Reaſons aforeſaid;

And muſt therefore conclude, that it is the Effect of Law, that Man is to Man as a God, and not as a Wolf. Now the End and Deſign and Aim which all Laws ſhould level at, is no other than this, That the People may live happily: The Inſtruments and Sinews of all outward Bleſſings, being good Laws; which I have with no ſmall Care, Labour and Pains,
collected

collected together; and now if my Labours should find a kind Reception and Approbation, it is the End and chief Aim of all my Wishes.

The Knowledge of which Laws are most agreeable to all Persons that live under a Government: The true Understanding whereof being an excellent Defence against Tyranny and Oppression.



E

R E A-

REASONS

OFFERED FOR

Punishing GAOLERS;

AND

For regulating their FEES, and other
OPPRESSIONS; and for suppressing
THEFTS and ROBBERIES.

In a Letter sent to the *Gazetteer*.

S I R,

I DID some time since transmit to you, out of a pure Motive of Justice, several barbarous and inhuman Facts committed by Gaolers; with the particular Circumstances thereof that had then occurred, and which I desire may be again repeated, with the additional Occurrences since the former Impression; especially there being now a Committee of the Honourable House of Commons sitting to enquire of the State of the King's Bench Prison; and are Reasons humbly offered for punishing Gaolers, and suppressing their exorbitant Fees and other Oppressions.

There

There have been often Enquiries made of the Hardships of Prisoners for Debt in all the Prisons and Gaols of this Kingdom; but no Enquiries have been hitherto made of the Prisons of *Bridewell*, and other Prisons. The Oppressions there practised, are worthy every one's Notice and Observation, as by the following Instances fully appear :

I took an Occasion lately to inspect into several of those Prisons; and on my first Entrance into one of them, to my great Surprise and Astonishment, I found a poor Country Taylor, lying on the Stones, almost Expiring for Want; and being told, he had been taken up by the Constable of the Night, was, for want of Sureties of the Peace, committed to hard Labour; and that his Time of Commitment being expired, was, for want of Payment of the Gaoler's Fees, continued in Prison without the usual Allowance of Bread, &c. and was afterwards carried out of the said Gaol on a Man's back, and laid in the Streets, for fear he should die in the Prison, &c.

That upon further Enquiry, I found there had been several other Prisoners, brought into the said Gaol by the Constable of the Night, and were discharged by the Justice of the Peace, but continued for the Gaoler's supposed Fees.

It will therefore be necessary, on this last Occasion, to observe, That Prisoners taken up by the Constable of the Night, are in Law

still in their Custody, till discharged, bailed or committed by a lawful Warrant; and then, and not before, are they said to be the Gaoler's Prisoners; and then are they intitled to Fees, and not before; and Fees otherwise taken, are Extortion, and false Imprisonment lies upon it: And the Reason is, for that a Gaoler cannot receive an Offender without a *Mittimus* from a Justice of the Peace, without subjecting himself to a Fine and Imprisonment; because it is taking upon himself an Authority not warranted, in making himself Judge of Record, &c. In support of which, *Magna Charta, cap. 29.* is full in this Point; which says, that no Man shall be taken and imprisoned, attached or restrained of his Liberty, but according to Law, either by Command or Order of a Court of Record, or by lawful Warrant, or the King's Writ. And the Case of the Keeper of *Wood-street Counter* is likewise full in this Point. But I must observe, that it may happen, on some particular Occasions, that it may be necessary to attach the Person of a Subject without observing the due Course of Law; but then the Necessity must justify the Case.

By the Common Law of *England*, so much was the personal Liberty of the Subject favoured, that the Body of a Man was not liable to be arrested but for Force, and for Things done against the Peace, &c. And for this Reason, Justices of the Peace ought to con-

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conclude their Warrants against the Peace, &c. And therefore I apprehend, that every Subject of *England*, who is taken and imprisoned, has a Right to claim the Benefit of *Magna Charta*.

That afterwards, going into another of these Prisons, upon my first View there, I observed a Baker double Ironed; and that upon asking the Occasion of such Treatment, I found he was committed for want of Sureties of the Peace, or on some other slender Occasion: But, that on the Night of his Commitment, the Gaoler came into the Prison in Boots, and the poor Baker not complimenting him, not knowing him the Gaoler, was pleased to give the Baker several Blows in the Face, to teach him, as it was there said, better Manners; which said Blows the Baker returned; but being immediately informed of his Mistake, he presently fell on his Knees, and humbly begged Pardon: But that not being sufficient, he was charged with double Irons, as abovesaid, and afterwards put into the Dungeon.

That afterwards, proceeding in a little further into the said Prison, I found another poor Man in the abovesaid Dungeon, surrounded with Rats and Lice in abundance; and that he was put therein, by the Gaoler, for no other Cause, but only on Suspicion of Writing over the Garnish Book of Fees of the said Prison without the Gaoler's Leave; and

that he was no Prisoner, at that time, but detained only for the Gaoler's Fees: Upon which I promised the poor Man, that I wou'd speak to the Gaoler; but on my going towards him, I found him surrounded with a numerous Attendance, each striving to pay him Compliments, and to lay hold of the Bridle or Stirrup to mount him on his Sorrel Gelding, waiting for him in his Court Yard for that Purpose.

That upon further Enquiry, I found the poor Man, last abovementioned, stood charged to the Gaoler for his Commitment Fees, 12 s. 6 d. or some such Sum, and for his Chamber Rent, at 1 s. the first Night, and 6 d. a Night afterwards, which said Fees and Chamber Rent amounted in the Whole to about 40 s. which he must either Pay or Starve to Death; which Case too often happens there. And upon further Enquiry, I found he was committed by the Court until he paid his Fine; which being paid, he insisted the said Gaoler could not detain him, and that no Fees was due on such Commitment, for the following Reasons: For, that by the Common Law of *England*, where a Person is indicted before Justices of the Peace, and committed till he pays his Fine; when such Fine shall be paid, he shall pay no Fees either to the Sheriff or Gaoler. *Crompton 176.*

It is a certain and true Observation, that the Alteration of any of these Maxims of the

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the Common Law is most Dangerous. But some Acts of Parliament, changing the Rule of the Common Law, gave to the said Ministers of the King Fees in some particular Cases to be taken of the Subject; whereas before the making of such Acts, the Ministers of the King were to do their Office without Fee.

But at this Day, they can take no more for doing their Office, than what is allowed by Authority of Parliament. 4 *Ed. 3. cap. 10.* 27 *Eliz. cap. 12.*

I likewise found, that in every of the Rooms of the said Prison were mostly three Beds, and seldom less than two in a Bed, and seldom a Room brought in less than 4 *s.* a Night, each Person paying 1 *s.* a Night for his Lodging for the first Night, and 6 *d.* every other Night after: And I take it upon me to say, that all the Beds in a Room were not worth, to be sold, 15 *s.*

That some time afterwards, upon further Enquiry, I found that the abovesaid Gaoler had made Information to a Justice of the Peace, that a Woman had brought into his Gaol Spirituous Liquors; upon which she was convicted in the Penalty of 10 *l.* according to the Statute, and that the said 10 *l.* was paid to the Gaoler; half of which Penalty was to go to the Informer, and the other half to the Poor of the said Gaol: But instead of Distributing the one half to the poor Prisoners, he only

only gave them two Legs of Beef and Broth; but the rest of the Penalty is not yet accounted for.

Does it not by this Behaviour in the Gaoler plainly appear, that the Magistrates are hoodwinck'd or casually blinded? for which Reason I must submit it, how Gaolers are upheld and supported, and for what Reason.

The Statute of 2 G. 2. says, that no Gaoler whatsoever shall take more than such Fees and Chamber Rent as the Statute prescribes; yet the said Gaolers above insist, that they are not comprehended therein: And the said Statute further says, that every Prisoner shall be at Liberty to send for Beer, Ale, &c. from any other Place; which said Indulgence hath been intirely denied them; so that every Prisoner must have his Beer, &c. from the Gaoler's Tap at 4d. per Quart, and not otherwise; for which Reason the poor Prisoners are grievously oppressed, and the Effect and Purport of the Statute evaded and eluded.

I must further observe, that all Gaolers apply to the Justice of the Peace for Licences to sell Beer, Ale, &c. and are constantly allowed such, on the same Conditions as all Publick Alehouses are, that they will perform and keep good order and rule in their Houses, according to the Tenor and Purport of such Licence.

The Statute of 22 & 23 Car. 2. enacts, That every Gaoler or any other Person what-

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soever, to whose Custody or Keeping any one arrested or taken, shall be committed on any Pretence whatsoever, shall suffer him or her at their Will and Pleasure to send for Beer, Ale, &c. or Victuals, as they shall think fit, and to pay such Chamber Rent as the Statute directs, and bring in their Bedding as they shall think fit; and the said Statute inflicts a Penalty of 50 *l.* on a Gaoler for not permitting Prisoners so to do; yet the said Gaolers of *Bridewell*, *New Prison*, *Newgate* and the *Borough*, insist they are not comprehended under the Penalty of the said Statutes, altho' they are all licensed according to the Statutes to sell Beer, Ale, &c. as common Victuallers. And I must further observe, that those Gaolers let out their Tap generally to their Deputies, some for 30 *l.* 40 *l.* and a 100 *l.* a Year: And how must this Rent be paid? Why truly on the Miseries of poor distressed Objects.

I must therefore submit it to Consideration, whether any Gaoler of the abovesaid Prisons ought to be licensed at all, for the Reasons abovesaid.

These shocking Circumstances, being so plainly and perfectly represented, I proceeded further to another Prison; and there I found amongst others, a poor Man that had been a Housekeeper in *Bell-Yard* near *Temple-Bar*, imprisoned there upon Suspicion of Buying Glass Bottles, knowing them to be stole, and that he paid the Gaoler of the said Prison three
Guineas

Guineas for taking off his Irons, altho' the Person suspected of Stealing the said Bottles was tried and acquitted of the said Felony two Months before.

And that upon further Enquiry, I found this poor Man was taken up by a new Set of Thief-Catchers, called *The Gaoler's Hussars* or *Pandours*, and was afterwards carried by those Thief-Catchers from Place to Place, till afterwards they delivered him to the Gaoler of the *B.* tho' the Fact, supposed to be committed, was committed in another County, than from whence the Prisoner was taken.

But before I proceed further on this Occasion, it will be necessary to observe, that Gaolers, with their *Hussars*, &c. taking upon themselves such Liberties, as last abovementioned, intirely subvert the Common and Statute Laws of this Kingdom:

1. For that by the Common Law, it is said, That every Offence was to be enquired off, heard and determined, in the proper County where the Offence was committed,

2. And further, 'tis a Maxim in our Law, *Ubi non est Principalis non potest esse Accessarius*, where there is no Principal there can be no Accessary. And it was so resolved in *Syer's Case*, that if the Principal be pardoned, or hath his Clergy, the Accessary cannot be arraigned; and no one can be Principal before it be so adjudged by Law, viz. by Judgment upon a Verdict, or Confession, or by Outlawry. *Co. 4 Rep. fo. 43.*

A

A Man taken up for Felony must be carried to the Gaol where taken; and not to the Gaol of any other County, unless there be no Gaol in that County. *Stat. 13 Ed. 3: 27 Eliz. cap. 13.*

Note; There cannot be an Accessary, unless there be a Felony committed; therefore the Gaoler abovementioned, in receiving the said Prisoner, and the *Hussars* for apprehending and delivering him as aforesaid, are all Guilty of false Imprisonment, &c. and ought as Examples to others, to be severely Punished.

Having set forth the several Facts and Cases of Persons that have occurred to my own Knowledge and Observation, it will therefore be necessary to enquire how and for what Causes Prisoners committed to the Gaoler's Charge can be ironed.

The *Mittimus* of such Prisoner to the Gaol, must contain the Cause of such Commitment. And this Opinion is justified by Scripture; and which contains the Words of *Festus* to *Agrippa*, Acts xxv. ver. 7. *For it seemeth to me unreasonable to send a Prisoner, and not withal to signify the Crimes laid to his Charge.* And the Conclusion thereof must be, that the Prisoner be safely kept until he be delivered by due Course of Law; because Prisoners are not to be punished in Gaols, but to be kept safely there; for putting a Man in Irons is Punishing him.

That

That Gaolers putting Prisoners in Irons is against the Liberties of the Subject, and prohibited by the Common Law of *England*. It is indeed said, where a Gaoler has a just Cause to apprehend a Prisoner will make his Escape, and has made an Attempt to that Purpose, then, and not otherwise, can he be charged in Irons, notwithstanding the common Practice to the contrary: Therefore Ironing of Prisoners is unwarrantable and contrary to Law; by which Gaolers are forbid to put their Prisoners in Irons, or to any Pain or Torment, before they are attainted or convicted: Thus Charging of Prisoners in Irons is understood Prisoners for Felony, and then not till Conviction.

I must further observe, that our Law is so very tender in Favour of Liberty, that if a Man is so strictly imprisoned that he dies, it is Murder in the Gaoler; and the Coroner ought to enquire of such Prisoner's Death. That putting a Man into a Dungeon, or into a Place too Strait, is *Duress*. *Huggins's Case*. *Ld. Raym. Rep.* 1578.

Prisoners are not to be punished in Gaols, but to be safely kept. *Ibid.*

And I must further observe, that by the Common Law of *England*, while a Prisoner is in Gaol, the Gaoler is bound to give him Sustenance, and not to suffer him to die for Want. And the Lord Chief Justice *Holt*, in giving Judgment in the Case of the Queen and

and *Tooley* and others, said, That if one is imprisoned upon an unlawful Act, it was a sufficient Provocation to all the Subjects of *England*: And therefore where any Man is imprisoned for Fees of a Gaoler, where none is due by Law, and charged in Irons contrary to Law, 'tis a sufficient Provocation to all the Subjects of *England*; and that such Treatment of Prisoners are Oppressions, and ought strictly to be enquired into and punished.

That some of the aforesaid Cases may one time or other happen to any Man, therefore proper to be considered of while the same remains freshly discovered.

And that Gaolers taking Money of Prisoners for taking off their Irons, or excusing them from Irons, unless for the Causes aforesaid, is Extortion; and the Court of King's Bench has a general Superintendency over Persons who are in any respect Ministers of Justice, and may commit Gaolers using Prisoners ill or unreasonably.

It will therefore be necessary to enquire, how Prisoners committed for Treason, or for any other Offence, ought to be used in Prison.

If Felons come in Judgment to answer, &c. they shall be out of all Manner of Bonds; so that their Pains shall not take away any Manner of Reason, nor constrain them to answer, but at their free Will. *Bracton, lib. 3. f. 137.* And in another Place, saith, That Shackles about the Feet ought not to be, but for fear of an Escape. *Mirror of Justice, cap. 2.*

F

And

And he saith further, That none but those taken for Felony be put in Irons, and that otherwise they shall not be punished or tormented.

The Law saith indeed, That a Prisoner should be kept in *salva et arcta Custodia*, yet that must be without Pain or Torment.

And accordingly all antient Authors are against Pain or Torment to be put or inflicted upon the Prisoner, before Attainder or after Attainder, but according to the Judgment; and there is not one Opinion in our Books, or judicial Records, that can be seen and remembered, for the Maintenance of Tortures.
2 Inst. 35, 36.

Therefore it will be necessary to know, by what means one that is in Prison may be discharged.

Every Man imprisoned, is either imprisoned without lawful *Mittimus* or with lawful *Mittimus*: He that is lawfully imprisoned, is either imprisoned by lawful Commandment and Order, and Warrant, or by the King's Writ, by Commandment or Order of some Court of Record; and this Commandment, Warrant, or Writ, is either for Causes not being Felony, or Misprision of the same, or other publick Offence or Cause, or inferior Causes to these, as Contempts, private Actions or Suits.

If any Court of Record commit a Man for Contempt done in Court, they may discharge him by like Order at their Pleasure.

But

But if they, having Authority, do commit him for Treason, Felony or other Crime, or for Suspicion of the same, they cannot discharge him until he be enquired of, and either indicted and acquitted, or *Ignoramus* found, and delivered by Proclamation.

And so it is if any be taken and imprisoned by lawful Warrant, or the King's Writ for Treason, Felony, or other Crime, &c. he cannot be discharged by any Authority or legal Proceeding, but by the King only.

And here the Lord *Coke* observes, That there are two great Adversaries to the due Execution of these Laws beforementioned, especially in Criminal Causes; *viz. Præcipitatio et morosa cunctatio*; as if a Man or a Woman be committed to Prison, and within so short a Time to be indicted and arraigned, that 'tis not possible for them to send for or procure their Witnesses, this certainly is Precipitation: For the Law, both in real and personal Actions, doth give the Party, Tenant and Demandant, a convenient Time, without respect of Persons, to answer, &c. Much more it ought to be in Case of Life. See the second Part of the *Inst.* cap. 29. and the Petition of Rights, the 3 Car. Reg. and *Magna Charta*, cap. 29.

There is nothing within this Realm that Conserveth the Subjects in more Quietness, Peace and good Concord, than the due Administration of the Laws. 3 *Inst.* 183.

So odious was unjust Imprisonment, or unjust Detaining of any Freeman in Prison, as in ancient Time, there lay a Writ *de pace et Imprisonamento* &c. for that it may be observed and remembered, what several Remedies the Law hath allowed for the Relief and Ease of Poor Prisoners: But the readiest Way of all is, by *Habeas Corpus* in Term-time, or in the Vacation out of Chancery: As you may read at large in the second Part of the *Inst. Magna Charta*, cap. 29. and the Statute of *Gloucester*, cap. 9. and the Exposition upon the 3 *Inst.* 183.

Persons detained in Prison for any Thing except Felony or Treason expressed in the Commitment, may, by *Habeas Corpus* in Vacation Time, be brought before any Judge of the King's Bench, and be discharged upon entering into a Recognizance with one or more Sureties for Appearance in the King's Bench the next Term, or the next Assizes, for the Place where the Commitment was, unless the Party be secured for Offences not bailable. Judges denying *Habeas Corpus* to forfeit 500 *l.* and the Officer refusing to obey it 100 *l.* for the first Offence, and 200 *l.* for the Second: The Prisoner to pay 1 *s.* per Mile for Charges of Removal. 31 *Car. 2. cap. 2.*

The *Habeas Corpus* Act was suspended during the Time of the two late Rebellions, &c. and in the Reign of King *William*. 1 *G. 1. cap. 8.* 17 *G. 2. cap. 6.* 19 *G. 2.* 20 *G. 2. cap. 1.* Before

Before the making of the Statute of *Gloucester*, Men were detained in Prison before they were called to answer, which was very odious in Law. Writs *de odio et atia* out of the Chancery issued for their Relief (as appeared before in the Exposition upon the Statute of *Magna Charta*) especially where the Fact was either Misadventure or *se Defendendo*: And therefore this Act restraining these Writs doth prescribe a Course for their speedy calling to answer in those two Cases: But now the Writ *de odio et atia*, is revived by the Statute of 42 Ed. 3. cap. 1. as appears in the Exposition upon the 26 cap. of *Magna Charta*. Stat. Westm. 1. 3 Ed. 1. cap. 11.

Hereby it appeareth what Expedition ought to be used for avoiding of long Imprisonment; viz. until the next coming of the Justices. See for this *Magna Charta* as above.

And here it is to be observed, That the Law of *England* is a Law of Mercy for three Causes:

First, That the Innocent shall not be worn out and wasted by long Imprisonment, but (as hereby and by the Statute of *Magna Charta* appeareth) speedily come to his Trial.

Secondly, That Prisoners for Criminal Causes, when they are brought to their Trial, be humanely dealt withal.

Thirdly, The Judge ought to exhort him to answer without Fear, and that Justice shall be duly administred to him. 2 Inst. 316.

By the Common Law of *England* to avoid all Extortions and Grievances of the Subject, no Sheriff, Coroner, Gaoler, or other of the King's Ministers, ought to take any Reward for doing of his Office, but only of the King: And this appeareth by our Books, and is so declared and enacted by Act of Parliament in the 3 *Ed.* 1. and a Penalty added to the Prohibition of the Common Law by that Act.

But after this, the Rule of the Common Law was altered; and that the Sheriff, Coroner, Gaoler, and other the King's Ministers, might in some Cases take Fees of the Subject. It is not credible, what Extortions and Oppressions have thereupon ensued; so dangerous a Thing it is to shake or alter any of the Rules or fundamental Points of the Common Law; which, in Truth, are the main Pillars and Supporters of the Fabrick of the Commonwealth; as where I have noted more at large, yet not so largely as the Weight of the Matter deserveth. See the Preface to the 4th Reports.

And it is to be observed, That if any Man be grieved contrary to the Purview of this Act, he may, as hath been said, for his Relief therein, have an Action upon this Act, albeit no Action be expressly given: Which in this, and many other like Cases, upon the Branch of *Magna Charta*, is worthy of Observation. 42 *Ed.* 3. cap. 5. 38 *Hen.* 6. cap. 7. 6 *Hen.* 7. cap. 2, 3.

Having

Having observed above, how odious and unjust long Imprisonment is, therefore Gaolers ought to be very Cautious how they use Prisoners in their Gaols with Cruelty and Hardship: And first of all they should not expose a sick or weak Person, or an Infant, to the Cold, to the Intent to destroy him, 2 *Ed.* 3. 18. whereof he dieth. Secondly, By laying an impotent Person abroad, so that he may be exposed to and receive mortal Harm; as by laying an Infant in an Orchard and covering it with Leaves, whereby a Kite strikes it and kills it. *Crompton de pace* 24. *Dalt.* c. 93. Thirdly, By imprisoning a Man so strictly that he dies: Therefore where any dies within any Gaol, the Coroner ought to be sent for to enquire of the Manner of his Death, whether by Starving, by Wounding or Blows, by Poisoning, by laying Noisome or Poisonous Filth. *Hale's Pl. Coron. first Part* 431.

If a Prisoner in Gaol die a natural Death, yet regularly, the Gaoler ought to send for the Coroner to enquire; because it may possibly be presumed, that the Prisoner died by ill Usage of the Gaoler. *Hale's Pl. Coron. fo. 57.*

That Masters or Governors of the House of Correction should have some fit Allowance and Maintenance for their Travel and Care, to be had in their said Service; as also for the Relieving of such as shall happen to be weak and sick in their Custody; and that the Subjects

jects of this Realm should in no sort be overcharged to raise Money for Stocks to set such on Work, as shall be committed to their Custody.

Be it therefore enacted, by the Authority of this present Parliament, That the Masters or Governors of the said Houses of Correction shall have such Sum of Money yearly, as shall be thought meet by the most Part of the Justices within the said County at the Quarter-Sessions of the Peace, the same to be paid Quarterly beforehand by the Treasurers appointed by an Act in the 43 *Eliz.* during the Time they the said Masters or Governours shall be employed in the Service; the Masters or Governors giving sufficient Security for the Continuance and Performance of the said Service; which if the said Treasurer shall neglect or refuse to perform, that then the said Master or Governour of the said House of Correction, shall have Authority by this present Act to levy the same in such Manner and Form, as by the said Statute they the said Treasurers are appointed and authorized to levy the weekly Sum or Payment being to them unpaid. *3 Inst. 731. Stat. 43 Eliz. 17 G. 2. Title Houses of Correction.*

As to the Usage of Gaolers abovementioned, it will appear by the poor Objects before taken Notice of how these Statutes abovementioned have been complied with.

Note;

Note; These Gaolers are under the Justices of the Peace's Direction, who are to enquire and visit the Houses of Correction twice every Year, and report the State thereof at the next General or Quarter Sessions. And if the Masters of such Houses shall be remiss in their Duty, the Justices may Fine them, and may appoint other Masters, and make order for the better Regulation of such Houses. But how these Acts have been complied with, I must submit it to be enquired of. The enormous Crime of which, his Majesty, in his Speech to his last Parliament, has thought fit to declaim, are Robberies and Murders: That by distinctly Considering each of those Degrees, we may be able to discover the true and original Grounds from whence they derive. His Majesty observes, with the greatest Regret, That the horrid Crime of Murder and Robbery are of late rather increased than diminished: And further observes, The Works of Reformation are not to be effected at once; but every Body should contribute their best Endeavours; and recommends it to every one's serious Attention as an important Object.

The chief Aim at suppressing those horrid Evils complained off, is first to strike at the Root, and then of Course the necessary Consequences will follow.

The first and chief End of all, I humbly apprehend, will be the most conducive for
this

this Purpose to appoint Justices of the Peace, Men not only for their Estates and Fortunes, not Mercenary or Covetous Persons, but for their Discretion, Abilities and Spirit; not suffering themselves to be imposed upon by Gaolers and Thief-Catchers, as it has been too often observed and seen. I shall therefore first observe, That a good Justice is he that administers Justice with an impartial Hand, and looks with an equal Eye on the Accuser, as well as on the Accused, till the Evidence of Facts determines his Judgment, and before he convicts, examines into the Truth of a Complaint; and if he finds the Complaint litigious and ill-grounded, or if of little Consequence, to advise the Parties to a Reconciliation, or dismiss the Complaint: Because Applications to Justices of the Peace, by the lower Class of the People, are frequently the Effects of Spirituous Liquors, especially in *London* and *Middlesex*. What then is the Consequence of such Application to a Justice? A Warrant to apprehend the Party complained of. Then the Constable is in the next Place to exercise his Authority by attaching the Party, and bring him to the Justice; where for the Sake of 2s. 4d. the Clerk's Fee, upon giving Bail by Recognizance, (or rather the Justice's Fee) he is then set at Liberty, on Bail: But if such Person so attached cannot procure Bail, he is forthwith committed to Gaol, and there must abide till he can procure his

his Enlargement by Stripping himself and his Family of all that they have to subsist, and for paying the Gaoler's Extravagant Fees, or continuing till the next Sessions; by which time he becomes a hardened Libertine; the Event of which is, he becomes a Thief or a Robber for Subsistence; if a Woman, a common Prostitute; for it is not the Harassing a Libertine or common Prostitute will make either Honest or Modest: It is well known, that Persons who have lost their Reputation, have lost all Sense of Shame.

I shall therefore make this general Remark, That those poor Creatures are dragged from the Streets to a Gaol or House of Correction, where Persons of both Sexes, old and young, are promiscuously huddled together; and for want of Bribing a poor beggarly Watchman is committed to one of those Places; from whence she has not failed to come out a confirmed abandoned Libertine, not reformed or amended as our Laws suppose them to be, and is not punished for her Vices, but chiefly for her Poverty. These are the first Introductions to Thefts and Robberies; from whence all Manner of Wickedness is derived. Some have advanced Notions, That the Chief of these Miseries, so affecting this Town, have arisen from bad Servants; and have pointed out the Method of Preventing them for the Future: But all these Propositions have ap-
peared

peared Whimsical, and pointed out with no other View than for Gain and Popularity.

I must also observe, That these Gaols are the Sinks of Lewdness and Immorality; that even Children are privy to the greatest Obscenity: Therefore those Methods cannot answer the Purposes of Reformation, but the Purposes of a rapacious and merciless Gaoler, and his pretended Deputy. These are all Matters of Fact, and Matters of Fact are better than all the Arguments that can be advanced on this Occasion.

That every Person committed to *Bridewell*, or any other House of Correction to hard Labour, is to be supported and maintained by his Labour, so much as he can earn at some Employment or other.

That Beating of Hemp is the chief Employment of these Places: And that every Person so employed as above, brings into the Gaoler's Pocket 1s. a Day; and the poor Creature, that so labours, has only a Penny Brick, at Fourteen to the Dozen, from six in the Morning to six in the Evening: And if such poor Creature does not do his daily Task, he is tied to a Post, and beat with a Bull's Pizzel, till he can perform his Task.

The Intention of the Legislature was, That those poor unhappy Objects should not work to get Estates for Gaolers, but that they should be paid a Price for their Labour,

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hour, such as was reasonable, and no more; And I have been credibly informed, that those poor unfortunate Objects frequently brought in to the Gaoler's Pocket, for their Labour as aforesaid, three Pounds a Week, clear of all Charges.

Is it therefore to be wondered at, that some of those Oppressors of Justice should be worth *Ten Thousand Pounds*; keep their fine Chaises, Horses and Servants; and frequent the publick Places of Diversions in the most distinguished Manner; visit their Superiors, &c. can afford such Gaieties and Pleasures, without such unlawful Ways as above?

Therefore Gaolers are the Oppressors of the People; and their Fees are Extortion; and that Thief-Catchers, *Hussars* and *Pandours*, are a Confederacy of wicked People, chiefly designed to entrap poor unwary People; and are the chief Causes of Hurrying poor abandoned Wretches into their Wiles and Contrivances: (And, like a decoy Duck, after he has drawn in his fellow Creature into the Snare, rejoices at the Mischief, and then takes wing, and returns again to the same Mischief, till he has alternatively destroyed the whole Species.)

And then suggest this afterwards as a Merit to their Country's Favour; and by that Means impose on the Credulity of an unthinking Magistrate, when they are the chief

G

Cause

Cause of the Cruelty and Distempers that
affect the Town: And until this is taken into
Consideration, all other Ways and Means
to suppress Thefts and Robberies are vain
and idle.

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T A B L E

T O T H E First Part of this B O O K.

A.

ALFWIN Rector of *Sutton*, and divers Monks of *Abingdon*, at the Time of the Conquest, were expert in the Laws of *England*. Page 5

Appeals lay from the Hundred Court to the County Courts. 7

None ought to be arrested and imprisoned in Inferior Courts, where the Cause of Action did arise out of the Jurisdiction, in the Penalty of double Damages. 24

None could appear by Attorney, by the Common Law, but by the King's Letters Patents;
G 2

Patents; but was obliged to attend his Cause in proper Person. *Page 27*

The Form of the Affidavit to be made, that the Cause of Action did arise out of the Jurisdiction. *ibid.*

Affidavit to be delivered to the Curfitor of the County where such Action is brought. *ibid.*

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A Man wrongfully brought into a Jurisdiction, and there lawfully Arrested, must be discharged. *21st. 30. 31st. 32nd. 37*

If an Action be brought on a Promise in an Inferior Court, not only the Promise, but the Consideration must be alledged to arise within that Court. *38*

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C.

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The *Britains* in some Hallowed Place. *ibid.*

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The first Restraint of the Clergy from Practising the Common Law, being about the Beginning of *Henry* the Third. *5*

In the Time of the *Saxons*, twelve of the most eminent Men did ride the Circuits for doing Justice. *7*

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Before the Courts of *Westminster* were erected, the County Courts were the chief Courts of the Kingdom, till reduced by *Magna Charta*. *9, 10*

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In

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for not saying, the Nursing was within the
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In an *Indebitatus assumpsit*, for that the Defen-
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